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IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

ALEXIA MORRISON, INDEPENDENT COUNSEL,
Appellant,

v.

THEODORE B. OLSON, *et al.*,
Appellees.

On Appeal from the United States Court of Appeals for the District of Columbia Circuit

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REPLY BRIEF FOR APPELLANT

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REPLY BRIEF FOR APPELLANT

I. THE STATUTORY SCHEME

Appellees seek to resurrect the statutory contruction of the majority below.[1] The effort is generally to denigrate the power of the Attorney General over the invocation of the process of the Act, and to depict the Special Division as engaged in "supervision" of the conduct of criminal investigations by independent counsels.[2]

A. Executive Branch Control

Appellees argue that the Attorney General possesses "unreviewable authority over the initiation of proceedings under the Act . . . only if he ignores both the literal terms of the statute and its explicitly declared intent." Olson Br. 31. It is true that the statute mandates application for the appointment of an independent counsel upon a finding by the Attorney General that there are "reasonable grounds to believe that further investigation or prosecution is warranted." Appellees ignore, however, the substantial degree of discretion lodged in the

[1] Interestingly, the Solicitor General does not.

[2] There are other proffered distortions as well. For example, appellees mount a baseless attack on 28 U.S.C. § 595(e), which requires that the Attorney General respond in writing to any request for an application for an indepedent counsel from a majority of the members of either party of the Judiciary Committee of the House or the Senate. *See* Olson Br. 11 n.27, 30-31; Schmults Br. 50. The provision merely acknowledges that Members of Congress, like ordinary citizens, can bring to the attention of the Attorney General information which in their judgment would justify the appointment of an independent counsel. It is for the Attorney General alone to decide whether to apply for the appointment of an independent counsel. *See* 28 U.S.C. §§ 592(a)(1), (b)(1). Thus only he can "trigger" the statutory process. The fact that the Attorney General must report his actions to the requesting Committee members under § 595(e) does not render the provision obnoxious. Our laws are replete with requirements that the Executive Branch report upon its law enforcement efforts to the Congress, *see, e.g.*, 42 U.S.C. § 2000aa-11(b); 28 U.S.C. § 522; 28 U.S.C. § 529, requirements which obviously serve legitimate legislative goals, *see McGrain v. Daugherty*, 273 U.S. 135 (1927).

Attorney General and the fact that his decision is not subject to review by any authority. That discretion includes the power to determine whether the factual allegations, if true, are sufficient to constitute a violation of the law, 28 U.S.C. § 592(a)(1), and whether they are as a matter of fact sufficiently specific and credible to warrant formal investigation, 28 U.S.C. §§ 592(a)(1)(A), (B). The Attorney General also decides whether the results of any preliminary investigation he orders warrant further investigation or possible prosecution. 28 U.S.C. §§ 592(b)(1), (c)(1). Moreover, in doing so, he must "comply with the written or other established policies of the Department of Justice with respect to the enforcement of criminal laws." 28 U.S.C. § 592(c)(1). In other words, the Attorney General is to exercise his prosecutorial discretion at this stage of the investigation just as he (or his subordinate) does in every case.

It is no objection that the preliminary investigation is limited as to time and scope, or that Congress has made clear its intent that the Attorney General invoke the statutory process in the absence of a clear determination that there are no grounds to proceed. Congress justifiably concluded that criminal investigations can be compromised by the injection of political considerations at very early stages,[3] and thus directed that the substantive investigation, as well as any resulting prosecution, be conducted by the independent counsel, not the Attorney General. Similarly, the very nature of the problem to which the statute is addressed—the existence of a disabling conflict or the potential for one in the Department of Justice—counsels insistence that close calls be made in favor of further investigation.

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[3] At the outset of the Watergate investigation, for example, Justice Department officials, doubtless acting in good faith, kept the White House informed of the progress of the investigation and the proceedings of the grand jury, which greatly facilitated the conspiracy to obstruct justice. *See* H.R. Rep. No. 93-1305, 93d Cong., 2d Sess. 104-15 (1974).

The fact remains, however, that the procedures of the Act can only be invoked where the Attorney General himself has affirmatively determined that a reasonably prudent prosecutor would proceed, and he brings to that determination all the discretionary powers which he brings to any case. Attorneys General have displayed no reluctance to exercise those powers to pretermit potential investigations of high Administration officials.[4] The Executive Branch thus retains the exclusive keys to the statutory process.

Appellees make much of the Division's power to "define [the] independent counsel's prosecutorial jurisdiction," 28 U.S.C. § 593(b), which they claim both diminishes Executive Branch prerogatives and entangles the judiciary in the prosecutorial process. Properly viewed, it does neither.[5]

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[4] Not only did the present Attorney General foreclose investigation of appellees Schmults and Dinkins on the basis of a threshold finding that they lacked criminal intent, but he declined to seek the appointment of independent counsels in cases involving allegations concerning the conduct of Ambassador Faith Whittlesey and Circuit Judge Douglas H. Ginsburg when he was a member of the Justice Department. *See* H.R. Rep. No. 100-316, 100th Cong., 1st Sess. 26 (1987); N.Y. Times, Feb. 11, 1988, p. A-17, col. 1. *See also Dellums v. Smith*, 797 F.2d 817 (9th Cir. 1986); *Banzhaf v. Smith*, 737 F.2d 1167 (D.C. Cir. 1984); *Nathan v. Smith*, 737 F.2d 1069 (D.C. Cir. 1984).

[5] Appellee Olson claims that the subpoena *duces tecum* issued to him should be quashed because it seeks evidence of an alleged conspiracy to obstruct the House Judiciary Committee's investigation, which he asserts is not within the independent counsel's jurisdiction. First, this argument incorrectly reads the subpoena to call for documents exclusively relevant to the conspiracy allegation. Any of the documents may be relevant on the issues of whether appellee's testimony was true or whether it was obstructive of the investigation wholly aside from any conspiracy allegation. Second, on its face, the Attorney General's Report referring this matter to the Division contradicts Mr. Olson's jurisdictional thesis. The Report requested appointment of an independent counsel to investigate whether, as the Committee alleged, specified aspects of appellee's testimony "violated 18 U.S.C. §§ 1505, 1001, *or any other provision*

In the first place, it is the Division's settled interpretation of the Act that it may not grant to an independent counsel jurisdicion over allegations which the Attorney General has considered and rejected as not warranting further investigation. *In re Olson*, 818 F.2d 34, 47 (D.C. Cir. Indep. Couns. Div. 1987); *see* Appellant's Br. 18-19. Appellees' reliance upon the Division's order in the Iran/Contra matter—which has never been challenged (indeed, has arguably been ratified) by the Attorney General—is misplaced in light of the later ruling, following argument by the Attorney General and appellees, in *In re Olson*.[6] *See* Appellant's Br. 18-19.

Second, it would not destroy the constitutionality of the Act if the Division did differ within limits from the Attorney General in the definition of the independent counsel's jurisdiction. Congress presumably lodged the power to define jurisdiction in the Division as a safeguard against the crippling of investigations by virtue of the very conflict of interest which justifies the statute's existence. Exercise of this power by the Division does not involve "supervision" of any aspect of the criminal investigation; delineating the boundaries of an investigation is a far cry from a decision whether prosecution

of federal criminal law." Report of the Attorney General Pursuant to 28 U.S.C. § 592(c)(1) Regarding Allegations Against Department of Justice Officials in the United States House Judiciary Committee Report, April 10, 1986, at 2-3 (emphasis added). The Report also recommended that the jurisdiction of the independent counsel include investigative and prosecutorial authority over "*any other matter related to that allegation*." *Id.* at 11 (emphasis added).

[6] Similarly unavailing is the suggestion by *amicus curiae* Michael K. Deaver that the Division's supplemental order in his case, permitting investigation and prosecution of perjury and obstruction of the independent counsel's investigation, rendered what he calls "the Division's prior decision in *In re Olson*" a "nullity for all practical purposes." Deaver Br. 15. The order of which Mr. Deaver complains (which was entered on December 16, 1986) *antedated* the decision in *In re Olson* (which was entered April 2, 1987), not the other way round.

should go forward. *Cf. United States v. Cox*, 342 F.2d 167 (5th Cir.), *cert. denied*, 381 U.S. 935 (1965). The power is plainly a necessary incident of the power to appoint, particularly where the office is created *ad hoc* to deal with a particular exigency. *See* J.S. App. 125a; Appellant's Br. 44-45. And the definition of the permissible scope of an investigation is qualitatively indistinguishable from ordinary judicial tasks such as passing upon prosecutorial applications for search and arrest warrants, adjudicating challenges to grand jury subpoenas and referring potential contempts of court to the Justice Department or to private counsel for investigation and possible prosecution. *See Young v. United States ex rel. Vuitton et Fils S.A.*, 107 S. Ct. 2124 (1987); Appellant's Br. 44-45.[7]

B. The Question of "Supervision"

Despite appellees' almost hypnotic repetition of the word "supervision," they have not pointed to a single provision of the statute which empowers the Division to influence, much less control, any aspect of the conduct of an investigation or prosecution by an independent counsel. This is for the simple reason that there is no such provision in the Act.

The aspect of the statute about which appellees most seriously complain ensures the independent counsel's independence from the Division, every bit as much as from the Executive and Legislative Branches. Section 594(a) expressly grants to an independent counsel with respect to all matters within his jurisdiction "full power and independent authority to exercise all investigative and prosecutorial functions and powers of the Department

[7] This is not to say that there are no limitations, either statutory or constitutional, upon the Division's power to define an independent counsel's prosecutorial jurisdiction. The scope of such limitations, like so many of the questions which appellees press upon the Court, should be litigated in cases where they arise upon the record, and not in the abstract in the context of a facial challenge to the statute itself.

of Justice . . . ." Nothing in the Act purports to give the Division control over the exercise of any of these powers. It cannot direct that an indictment be sought or not be sought, or that a particular charge be included within or eliminated from an indictment or information, or that any witness be subjected to or shielded from interview, grand jury subpoena or any other form of scrutiny or process. It has no power over the design of the investigation, the grant of immunity, the process of plea bargaining or the conduct of litigation. In short, it has no "supervisory" authority whatever.

The examples of purported "supervisory" power to which appellees point are so far-fetched as to reveal the very weakness of their argument. Thus appellee Olson asserts, without citation, that "the statute requires the Division to receive and review periodic reports from independent counsel, and from the Attorney General . . . ." Olson Br. 17. However, nothing in the statute requires "periodic" reports on their activities to the Division by either the independent counsel or the Attorney General. The Attorney General is required to report to the Division only once, at the conclusion of his preliminary investigation, *see* 28 U.S.C. §§ 592(b)(1), (d)(1), to explain his application and facilitate appointment of an independent counsel, or to make a record of his reasons for declining to make such an application. Likewise, an independent counsel submits but one substantive report to the Division, at the conclusion of the investigation or prosecution. *See* 28 U.S.C. § 595(b).[8] This report is not filed until *after* all potentially "supervisable" conduct has been completed, and the Division has no power to take any action on the basis of this report, except to determine which portions of it should be made public, subject to appropriate orders "to protect the rights of any individual named in such report and to prevent undue interference with any pending prosecution," 28 U.S.C. § 595(b)(3). The Division's receipt of such reports plainly does not thrust it into any "supervisory" role.[9]

[8] Newly enacted § 594(h)(1) also requires independent counsels in the future to file semi-annual expense reports with the Division. These are not substantive reports on the prosecutorial activities of the office, and the Division is in any event given no power to take any action on the basis of them. They thus contribute not a shred of "supervisory" authority to the Division.

Nor do the removal provisions of the statute afford any support to appellees' claim of "supervision" by the Division. In the first place, appellees insist, without offering any explanation, upon ignoring the 1987 amendments to 28 U.S.C. § 596(a)(3), which removed jurisdiction of an action for reinstatement by an independent counsel from the Division and eliminated the "error of fact or law" language upon which they place such heavy reliance. *See* Appellant's Br. 22-23. The Solicitor General, by contrast, has conceded that these amendments, which Congress has declared immediately applicable to sitting independent counsels, govern this case. Sol. Gen. Br. 15. Under the Act as it applies today, the Division

[9] Equally unpersuasive are appellees' assertions that the Division has engaged in "supervision" of the prosecutorial function by "secret[ly] . . . protect[ing] independent counsel from the operation of the criminal laws relating to conflicts of interest," Olson Br. 17-18, or because "a member of the Division has testified before Congress in support of the constitutionality and advisability of Title VI," *id.* at 18. Neither situation complained of involved "supervision" of any aspect of a criminal investigation or any impropriety on the part of the Division members. The Division has recited in appointing orders that independent counsels and their staffs are not special employees of the Department of Justice for purpose of the application of 18 U.S.C. §§ 205 and 207. This provision was a legitimate aspect of defining the nature and scope of the office pursuant to the Division's appointing authority, and became law in the 1987 amendments. *See* Pub. L. No. 100-191, 101 Stat. 1302, to be codified as 28 U.S.C. § 594(i). And the public testimony of Judge MacKinnon before a House Judiciary Subcommittee was consistent with the long-standing practice of Justices of this Court and judges of lower federal courts to give testimony before the Congress on the administration of justice and matters of concern to the federal judiciary.

has *no* role in reviewing a removal decision by the Attorney General.

Likewise, the Division's never-exercised power under 28 U.S.C. § 596(b)(2) to terminate the office of an independent counsel upon a finding that the mission of the office has been substantially completed lends no support to appellees' "supervision" argument, except on the "cynical view," Sol. Gen. Br. 16, that the Division will ignore the limited nature of its function. Section 596(b)(2), unlike § 596(a)(1), is not a general removal provision, and it involves the Division neither in the "supervision" of any aspect of the independent counsel's conduct nor in substantive review of the correctness or propriety of any action taken. The question of "good cause" for removal is exclusively for the Attorney General. The Division is merely empowered to determine that the investigation for which an independent counsel was appointed in the first place has been substantially completed.

II. THE CONSTITUTIONAL FRAMEWORK

Although appellees and the Solicitor General fault Title VI on a variety of grounds, we here restrict ourselves to addressing what seems to us the "meat" of the arguments for affirmance—that, even if neither of the other Branches benefits, the statute impermissibly deprives the President of three purportedly "core" prerogatives: (1) the right himself, or through his subordinates, to appoint all Executive Branch officers; (2) the authority to direct all such officers in the performance of their duties, especially those involving criminal law enforcement; and (3) the power to remove all such officers at will. Concededly, the statute does circumscribe presidential authority in the three ways listed. However, at least in the very limited context presented here, no constitutional violation results.

A. Appointment

The text of the Constitution expressly tells us that the power of appointment is *not*, in all cases, an exclusively presidential prerogative. The Appointments Clause invites the Congress to lodge the selection of "such inferior Officers, as they think proper" in a "Court of Law" or a "Head of Department." Assuming that an independent counsel is an inferior officer whose appointment Congress may provide for under the proviso of the Appointments Clause, the question here is whether appellees are correct that appointments by a court of law must be understood as impliedly confined to court officials.[10]

First, it is not obvious why we should depart from the plain words of the Clause and import such a restriction in the name of separation of powers. After all, the Constitution requires presidential nomination of the Justices of this Court, permits (perhaps requires) the President to appoint other federal judges, and authorizes the President to appoint congressional officers (*e.g.*, the Comptroller General, the Librarian of Congress). Why should we conclude that the Framers would have con-

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[10] Appellees Schmults and Dinkins renew in this Court their argument, rejected by both courts below, that the power of the independent counsel to appoint staff to assist her in the performance of her functions, *see* 28 U.S.C. § 594(c), somehow invalidates the statutory scheme or provides a ground for striking down their contempt judgments. Schmults Br. 35-36. They never explain, however, what impact their complaint, if accepted, should have on the contempt judgments. They fail to point, for example, to *any* action purportedly undertaken by any member of appellant's staff on his or her own authority as an "officer" of the United States, let alone any such action which affected them. Nor do they explain why their argument should be deemed properly before the Court. It was not accepted by either court below, and appellees did not cross-appeal or petition for *certiorari*. Presumably, the point is advanced as an alternative ground for sustaining the judgment of the court of appeals. But it is not clear that reversal of the court below on this question would produce the same judgment. In any event, on the state of this record, at least, appellant's staff are plainly not "officers of the United States," but mere "employees" whose appointments are not subject to the strictures of the Clause. *See Buckley v. Valeo*, 424 U.S. 1, 126 & n.162 (1976); *Auffmordt v. Hedden*, 137 U.S. 310 (1880); *United States v. Germaine*, 99 U.S. 508 (1879).

demned judicial selection of some Executive Branch officers as offensive to the separation of powers principle, while approving cross-branch appointments in the other direction?

Second, it is wholly unsatisfactory to suppose courts of law are expressly mentioned in the Appointments Clause for the sole purpose of authorizing Congress to permit a court to appoint its own clerk and bailiff. Surely, the Framers thought that went without saying—just as Congress may appoint its own officers without explicit constitutional authorization.[11] *Cf. Young v. United States ex rel. Vuitton et Fils S.A.*, 107 S.Ct. 2124, 2130-34 (1987). The fact that the proviso was added to the Appointments Clause at the end of the Convention, when further changes were unwelcome, indicates that it was a matter of some importance. Indeed, after its initial rejection by an equally divided vote, the proposal was put a second time on the ground that "some such provision [was] too necessary to be omitted" and was then unanimously adopted. 2 M. Farrand, *The Records of the Federal Convention, 1787*, 627-28 (rev. ed. 1911).

Plainly, the Framers were not concerned with the appointment of court personnel. Every reference indicates that the proviso to the Appointments Clause contemplated officers of the Executive Branch, and it expressly invites Congress to vest some such appointments in the law courts. The contrary notion is nothing less than a return, without textual justification, to the "archaic view of the separation of powers as requiring these airtight

[11] While art. I, §§ 2 and 3 expressly authorize each *House* to appoint its own officers, there is no provision for congressional appointment of officers of the whole *Congress*, such as the Director of the Congressional Budget Office and the Director of the Office of Technology Assessment, who are appointed by designated Members, 2 U.S.C. §§ 474(a), 601(2), and we suppose no one doubts the constitutional propriety of that arrangement, or of a like formula for the other named officers if Congress chose to abandon the current mode of appointment. This must be an exercise of inherent legislative power. *Cf. Anderson v. Dunn*, 19 U.S. (6 Wheat.) 204 (1827).

departments of government." *Nixon v. Administrator of Gen'l Services*, 433 U.S. 425, 443 (1977).

Third, the independent counsel is engaged in a nonpolitical task which does not normally implicate presidential policy. No doubt, the President should be free to choose as his Secretary of State an individual who shares his view of foreign policy and who will follow presidential directives without demur. Similar considerations may be relevant, today at least, in the selection of an Attorney General, whose responsibilities go well beyond enforcing the criminal law. But a prosecuting attorney owes allegiance to the law, not to a political master, and he does not normally receive direction from the President.

This is especially so in the present context, involving only an *ad hoc* prosecutor with an extremely limited mandate. An independent counsel is, moreover, subject to the policy guidelines formulated by the Attorney General, and, unlike other prosecutors, makes no policy and sets no priorities. He exercises only that discretion which is necessarily left to the individual prosecutor.

Finally, it bears repeating that no appointment can occur until and unless the Attorney General determines, in his unreviewable discretion, that an independent counsel is necessary. Neither Congress nor the judiciary can create this office. The potential independent counsel becomes an actuality only if the President's legal officer so decides.

B. Direction

The President's power of directing Executive Branch officers is not a universal axiom enshrined in the Faithful Execution Clause of Article II. Upon first reading, the Clause may appear to be little more than a truism: the task of the Executive is to execute the law. Presumably, however, the point of the provision is not to state the obvious, but—as the words "take Care" and "faithfully" suggest—to stress that the President has no power of

suspending the law enacted by Congress. So understood, the Faithful Execution Clause tells us nothing about the constitutional propriety of legislation that assigns responsibilities within the Executive Branch and, in discrete cases, exempts an executive officer from presidential direction or review.

To be sure, the Framers ultimately endorsed the principle of a unitary executive. This is not, however, a sufficient foundation for the elaborate structure that appellees seek to build upon it. It has always been unreal to posit a President who is legally responsible and politically accountable for every act done within the Executive Branch. Especially is it fanciful to suppose a President held to account by the people for the misdeeds of each of "his" prosecutors in the field. Conceivably, the public might attribute to the President a persistent failure to bring to book political allies guilty of official misfeasance, but, needless to say, that is not the complaint here.[12]

From the beginning, it has been recognized that Congress could allocate particular duties to officers within the Executive Branch and insulate their decisions from presidential review. *See* Appellant's Br. 49-51. The principle is settled that the single President ordained by the Constitution need not be left free to act as absolute ruler within the Executive Branch. The only open question is whether the conduct of criminal prosecutions is so essentially presidential business that Congress can assign no part of the task—however compelling the reason—to an independent officer.

As we have noted, the unique character of a prosecutor's task renders presidential interference abnormal—indeed, normally improper. Undeniably, criminal prosecution is Executive Branch business, but it is not, except in the rarest instance, *presidential* business. Unlike the conduct

[12] It seems obvious that avoiding such a default is more effective than indulging the hope that, after the fact, the electorate will "punish" the President responsible (or his party, if he himself is not standing for re-election).

of foreign affairs and the command of the armed services, the Constitution does not designate the President, personally, as the prime mover in criminal enforcement. In the debates of the National Convention, of the ratifying conventions, and in contemporary comments, including *The Federalist*, we have come across no reference to the Chief Executive controlling the prosecutors. On the contrary, the objections to the pardon power as potentially shielding the guilty confederates of the President suggest that at least some of the Framers thought he could not accomplish the same end merely by directing the government's attorney. *See, e.g.*, 3 M. Farrand, *supra* at 218 (Luther Martin). And, in fact, there appears to be no instance of a direct order to prosecute or not to do so until Attorney General Taney's Opinion of 1831.[13]

Nor is prosecution at the heart of the Faithful Execution Clause. Even today, the law is normally executed by means other than criminal prosecution. See, *e.g.*, *Buckley v. Valeo*, 424 U.S. 1, 138, 140-41 (1976); *Bowsher v. Synar*, 106 S.Ct. 3181, 3187-93 (1986). This was all the more so in the vision of the Framers, who anticipated very few federal crimes and a very meager, part-time, and decentralized prosecutorial force.[14] There is, indeed, a far better argument for protecting the President's civil enforcement powers from congressional diminution. This much broader arena is, typically, where policy, even politics, has a proper role and, therefore, is the place for presidential supervision. Yet the Court has repeatedly condoned insulating aspects of civil enforcement from presidential control, and has even approved congressional sanction of judicial review of a Cabinet

[13] 2 Op. Atty. Gen. 482 (1831); *see* L. White, *The Federalists* 164-68, 406-11 (1948).

[14] *See* L. White, *supra* at 166, 406; Appellant's Br. 41 n.56, 52-53 & nn. 73, 74. Besides criminal penalty provisions attached to a handful of revenue and commerce laws, the "criminal code" for the first decade under the Constitution enumerated barely twenty crimes, most of them confined to acts committed on the high seas or within federal enclaves. *See* Act of April 30, 1790, ch. 9, 1 Stat. 112.

officer's refusal to bring a civil proceeding. *Dunlop v. Bachowski*, 421 U.S. 560 (1975).

But even if Congress constitutionally might have wholly released the independent counsel from presidential policy, it did not go so far. The fact is that the independent counsel *is* subject to general prosecution guidelines formulated by the Department of Justice—except only where it is impossible to follow them. 28 U.S.C. § 594(f). In this way, the President's legitimate concerns are accommodated and, at the same time, the necessary independence of the independent counsel is attained.

Finally, the entire purpose—and, we submit, the net effect—of Title VI is to *enhance* the fulfillment of the executive's mandate of "faithful execution of the laws" in one limited, but important, category of cases affecting the health of our national government, by removing the prosecutorial function in these highly-charged cases from the maelstrom of partisan politics.

C. Removal

Very little space need be devoted to the complaint that the President's *alter ego* may remove an independent counsel only for cause. The retention of the removal power in the Attorney General safeguards against any self-indulgent frolic by an independent counsel contrary to established Executive Branch policy. Moreover, the so-called "Decision of 1789" settled nothing more than that the Senate's role in the appointment process does not empower it to reserve a similar unconstrained veto over removals. This Court has at all times—specifically including its decision in *Myers v. United States*, 272 U.S. 52, 160-62 (1926)—recognized that Congress may impose restrictions upon the President's power to remove inferior Executive Branch officers. That proposition was established more than a century ago in *United States v. Perkins*, 116 U.S. 483, 485 (1886), and was re-affirmed as recently as *Wiener v. United States*, 357 U.S. 349 (1958). Accordingly, assuming appellant is an inferior officer, the

question is whether there are unique reasons why this general rule should not be applied to an independent counsel.

Notwithstanding some *dicta* in *Humphrey's Executor v. United States*, 295 U.S. 602, 627-28, 631-32 (1935), we submit there are no exceptions.[15] The holding in *Perkins*, sustaining a prohibition on dismissal of military officers in peace time except for cause, strongly suggests that Congress is free to impose like restraints on the removal of *every* inferior executive officer. And the prevailing opinion in *Myers* itself contains no *caveat*. But even if a curb on the President's removal power is impermissible with respect to some Executive Branch officials who make policy, or whose office requires obedience to presidential policy, this is not such a case.

The criminal prosecutor, as we have said, is a servant of the law, not of the President's will, except in the rare case implicating other executive interests. To the extent that there exists a relevant general prosecutorial policy, the independent counsel is subject to it and is removable for inexcusably ignoring it. Thus, the removal provision of Title VI, like the other aspects of the arrangement already considered, trenches on executive prerogatives in no measurable degree.

D. Overall Effect on Presidential Prerogatives

The Solicitor General asserts that no prior decision of this Court condones what he describes as a three-fold incursion on Presidential prerogatives: the powers of appointment, direction and removal. But despite his strenuous effort to distinguish away the seminal ruling in *Ex Parte Siebold*, 100 U.S. 371, 397-398 (1880), we

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[15] It would indeed be ironic if the opinion in *Humphrey's Executor*, which not only upheld a "good cause" limitation on presidential removal power but was at great pains to limit the broad-ranging *dicta* of *Myers* with respect to the scope of executive power, *see* 295 U.S. at 626, were read to expand the constitutional removal prerogatives of the President beyond those asserted in *Myers* itself.

submit that decision controls our case. The Court there rejected a constitutional challenge to election supervisors who were appointed and removable by a court, with no executive supervision in the interim. Moreover, as we read the Solicitor General's brief, he would not bless the statute if it contained only what he saw as one vice or two, instead of three.

At all events, the opponents of Title VI gain nothing by seeking to cumulate the effect of the several features complained of. In truth, the overall consequence for presidential prerogatives is quite minimal when appointment, direction and removal are considered together. As we have noted, the Executive's powers are significantly preserved at each stage and each enhances the other. Thus the Attorney General can refuse to invoke the Act where to do so would conflict with other legitimate executive interests. And the independent counsel's duty to obey Department of Justice policies is reinforced by the Attorney General's authority to remove him if he inexcusably fails to comply. Neither singly nor in combination do the necessary restrictions on presidential control violate the text or spirit of Article II of the Constitution.

III. PRACTICAL CONSEQUENCES

Three purported "practical realities" are invoked against Title VI: (1) the "extraordinary isolation" of independent counsel from the Executive Branch, Levi, Bell, Smith Br. 2; (2) a potential for "significant disruption" of the Executive Branch, *id.*; Sol. Gen. Br. 42; and (3) perceived threats to individual liberty.

A. Isolation

It is argued that federal prosecutors within the Department of Justice are uniquely and exclusively positioned to know, respond to and apply with precision the collective wisdom of centuries under our constitutional system. *But see* Appellant's Br. 21 n.32. The statutory requirement that independent counsels comply with established Department policies and guidelines is dismissed on the ground that the truly important precepts cannot be written down

and are imparted through training and involvement with Department prosecutions over a period of time.

This argument ignores not merely a century of decentralized federal prosecution, *see* Appellant's Br. 52-53, but even the realities of current practice. The overwhelming bulk of federal prosecutions are conducted by the 94 United States Attorney's Offices—all administered by different United States Attorneys with diverse backgrounds and approaches—whose physical distance from departmental headquarters in Washington permits their day-to-day decisionmaking to be informed only by established, written guidelines and policies. The United States Attorneys are free, of course, to seek assistance on questions of policy or discretion if they choose to do so. But so are independent counsels. *See* 28 U.S.C. § 594(d). In either case, the "institutional memory" of the collective career staff of the Department is available only if the prosecutor recognizes the need for such guidance *and* voluntarily takes steps to obtain that information before taking action.[16]

B. Disruption of Executive Branch Policies

Appellees and *amici* argue, first, that decisions made in any given prosecution are fraught with potential for disruption of an overall executive design for development of the federal criminal law, and second, that prosecutorial interests must be weighed against competing executive interests, such as foreign affairs and national security. These concerns are overstated, and neither is ripe for resolution in this case—which involves no such executive conflicts. In any event, there are mechanisms established by the statute through which each can be addressed.

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[16] The charge of appellees and *amici* that independent counsels would not and do not seek departmental guidance pursuant to § 594(a) is supported by neither record evidence nor common sense. For a different view of actual experience under the Act, *see* Seymour Br. 24; Coleman, *The Case for the Independent Counsel*, Wash. Post., Feb. 22, 1988, p. A-11, col. 1.

The vision of irresponsible independent counsels, running roughshod over federal law enforcement concerns and competing executive interests to "get their man" (or woman) is without foundation. The small number of indictments sought by independent counsels to date and the 100 per cent conviction rate thus far are strong evidence to the contrary. The statute in any event provides three significant safeguards.

First, if the Attorney General perceives a threat to federal enforcement policy or competing executive interests arising from a potential prosecution, he can decline to apply for the appointment of an independent counsel. Second, if the issue arises later, the independent counsel may seek guidance under § 594(d), or the Department may communicate its concerns to the independent counsel. Finally, should the problem surface in some legal proceeding conducted by the independent counsel, the Department has the right to appear and be heard by the court considering the issue. 28 U.S.C. § 597(b).

Moreover, this particular goblin—like several others—is not before the Court. No foreign affairs or national security issues have arisen in connection with appellant's investigation, and the possibility of their appearance at some future date in this or some other case does not affect the facial constitutionality of the statute.

C. Threats to Individual Liberty

The expressed concern of the statute's detractors for the preservation of civil liberties have already been addressed. *See* Appellant's Br. 57-60. Two points bear emphasis here. Congress expressly sought—successfully, we submit—to *benefit* targets of independent counsel investigations in two ways: by insulating prosecutorial decision-making from the political pressures weighing upon the Attorney General in favor of prosecution, and by affording the enhanced name-clearing value of a decision not to prosecute reached by one independent of the Administration. More important, the essential safeguards of the Constitution, the Bill of Rights, the statutes and

rules governing criminal proceedings are fully applicable in any prosecution brought by an independent counsel. There is no ground to believe that the Framers looked to the structure of the executive establishment rather than to such traditional procedural safeguards for the protection of the rights of the accused. Indeed, as former Attorney General Griffin Bell has noted, the first Congress and those that followed for 80 years declined to create a centralized Department of Justice and preferred district attorneys "totally independent of the Attorney General" out of fear that "strong central enforcement of laws" by "machinery in the executive branch" might "serve as an engine of oppression." Bell, *The Attorney General: The Federal Government's Chief Lawyer and Chief Litigator, or One Among Many?*, 46 Fordham L. Rev. 1049, 1051 (1978).

One of appellees' *amici* submitted a most apt reflection on the source of evenhandedness and fairness in federal prosecutions.

> The qualities of a good prosecutor are as elusive and as impossible to define as those which mark a gentleman. And those who need to be told would not understand it anyway. A sensitiveness to fair play and sportsmanship is perhaps the best protection against the abuse of power, and the citizen's safety lies in the prosecutor who tempers zeal with human kindness, who seeks truth and not victims, who serves the law and not factional purposes, and who approaches his task with humility.[17]

The Executive has no monopoly on discerning these qualities in its appointees.

D. Proposed Alternatives

Appellees and the Solicitor General are at pains to outline what they claim are constitutionally acceptable alternatives for the achievement of Congress' purpose. It goes without saying that the Court's task is not to second-guess legislative choice. The question is whether

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[17] R. H. Jackson, *The Federal Prosecutor* (Address 1940), reprinted in Levi, Bell, Smith Br. App. 1a, 7a.

Congress' chosen means transgress constitutional limitations, not whether some other solution might be found, or even whether other potential schemes might avoid the constitutional issues now before the Court. In any event, none of the proposals put forward is obviously preferable in simultaneously achieving prosecutorial independence and avoiding constitutional questions. Those which would grant appointment power to the President or the Attorney General sacrifice a significant measure of the desired independence, quite unnecessarily, in view of the express provisions of the Appointments Clause. Similarly, expanding the executive's power of removal denigrates the prosecutor's essential independence without improving matters from a constitutional point of view, in light of this Court's unbroken recognition of the propriety of limitations on removal. The real question here is whether prosecutorial decisions in this narrow group of cases can be insulated from political direction by the President—as they must be to achieve the congressional goal. The language and history of the Constitution, as well as the historical realities of law enforcement against high government officials, argue forcefully that this end, achieved by these means, is not merely permissible, but entirely consonant with our scheme of government.

CONCLUSION

It is respectfully submitted that the decision below should be reversed.

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